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CONSTRUCTION OF THE WISCONSIN CONSTITUTION—RECURRENCE TO FUNDAMENTAL PRINCIPLES

JOHN SUNDQUIST*

I. INTRODUCTION

The Wisconsin Supreme Court has recently stated that it will not be bound by the minimum federal constitutional standards enunciated by the United States Supreme Court in construing the state constitution.

[I]t is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment.¹

An understanding of the basic principles of construction of the Wisconsin Constitution as developed by the state supreme court is necessary to an independent interpretation of the Wisconsin Declaration of Rights beyond the minimum federal guarantees. The Declaration of Rights has been largely neglected by the state courts since the application of the federal Bill of Rights to state action through the fourteenth amendment. Fortunately, a large body of Wisconsin constitutional law was developed during the period when the state, rather than the federal, constitution was the primary source of protection of individual rights. Additional light is shed on the state constitution by the numerous decisions discussing principles of construction in cases dealing with provisions of the Wisconsin

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1. *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210, 215 (1977). The court cites as examples *Carpenter v. Dane County*, 9 Wis. 249 (*274) (1859), requiring county-appointed counsel for felony defendants 104 years prior to *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923), applying the exclusionary rule 38 years prior to *Mapp v. Ohio*, 367 U.S. 643 (1961).

It is well established that "a State is free as a matter of its own law to impose greater restrictions on police activity than those [The United States Supreme Court] holds to be necessary under federal constitutional standards." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Decisions based on independent state grounds cannot be reviewed by the United States Supreme Court. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Constitution which have no counterpart in the Federal Constitution.

It was originally supposed that the state rather than federal constitution would be the primary source for the protection of individual rights. The Wisconsin Supreme Court, in the famous pre-Civil War Fugitive Slave Act cases, stated:

A mere glance at the history of the times, at the debates in the national convention that framed, and of the respective state conventions which adopted the constitution, will suffice to convince us that the respective states were regarded as the essential, if not the sole guardians of the personal rights and liberties of the individual citizens.²

Prior to the enactment of the fourteenth amendment in 1868, the only restrictions on state action were those imposed by state constitutions.³ The Declaration of Rights of the Wisconsin Constitution, independently construed by the Wisconsin court, limited state action during this period.

2. *In re Sherman M. Booth*, 3 Wis. 13, 87 [*1, *88] (1854) (Smith, J., concurring opinion).

The notion that the state governments would be more solicitous of individual rights was not received without skepticism. Story commented as follows in 1833:

It was long ago remarked that in a contest for power, "the body of the people will always be on the side of the State governments. This will not only result from their love of liberty and regard to their own safety, but from the strong principles of human nature. The State governments operate upon those familiar personal concerns to which the sensibility of individuals is awake. The distribution of private justice in a great measure belongs to them, they must always appear to the sense of the people as the immediate guardians of their rights. They will of course have the strongest hold on their attachment, respect, and obedience." [Quote from Alexander Hamilton's speech of 1786] To which it may be added, that the State governments must naturally open an easier field for the operation of domestic ambition, of local interest, of personal popularity, and of flattering influence to those who have no eager desire for a widespread fame, or no acquirements to justify it.

J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 210-11 (5th ed. 1891) [hereinafter cited as STORY].

3. Justice Brennan writes:

Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions. And prior to the adoption of the fourteenth amendment, these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable.

Brennan, *State Constitutions and The Protection of Individual Rights*, 90 HARV. L. REV. 489, 501-02 (1977) [hereinafter cited as Brennan].

It is thus apparent that long before the enactment of the fourteenth amendment, as well as since that time, our legislature was bound to accord to all persons within its jurisdiction the equal protection of the laws, and to refrain from legislation which deprived any of them of life, liberty, or the pursuit of happiness.⁴

The state constitution, construed by the state courts, continued to be the primary source for the protection of the rights of the people of Wisconsin during the slow process of absorption of the specific guarantees of the Bill of Rights into the fourteenth amendment. It was not until 1925 that the United States Supreme Court applied any of the first amendment guarantees to state action.⁵ Meanwhile, in 1890, the Wisconsin Supreme Court held that Bible reading in public schools violated the state constitution.⁶ Early Wisconsin decisions attempting to ascertain the state constitution's limits on the police power now provide a helpful guide to the construction of the fundamental provisions of the Declaration of Rights.⁷

The Warren Court's extension of the specific guarantees of the first eight amendments to state action⁸ resulted in the virtual abandonment of any principled discussion of the state counterpart provisions by the Wisconsin courts.⁹ The state

4. *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 435, 87 N.W. 561, 562 (1901).

5. *Gitlow v. New York*, 268 U.S. 652 (1925).

6. *State ex rel. Weiss v. District Bd. of School Dist. No. 8*, 76 Wis. 177, 44 N.W. 967 (1890). *Cf. Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (holding such practice to be violative of the first amendment). The specific holding in *Weiss* was based both on the prohibition against "sectarian education" of art. X, sec. 3, and on sec. 18 of the Declaration of Rights, which provides:

The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

7. See, e.g., *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911); *Nunnemacher v. State*, 129 Wis. 190, 108 N.W. 627 (1906); and *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098 (1902).

8. See *Brennan*, *supra* note 3, at 493-94 for an outline of the United States Supreme Court's extension of the specific guarantees to state action.

9. "During the activist Warren years, it was very easy for state courts, especially in criminal cases, to fall into the drowsy habit of looking no further than federal constitutional law." Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976).

counterpart provisions either were not discussed or were disposed of with the observation that they are "substantially equivalent" to the federal provisions.¹⁰ A few decisions recognized in theory the independent vitality of the clauses of the Wisconsin Declaration of Rights.¹¹ It is only within the past few years that the Wisconsin Supreme Court has indicated a willingness to return to an independent interpretation of the guarantees of the state constitution.¹²

This article is devoted to an examination of principles of construction of the Wisconsin Constitution as already developed by the Wisconsin Supreme Court. These principles provide a firm basis for an interpretation of the basic guarantees of the state constitution beyond the minimal federal standards.

10. See, e.g., *Haase v. Sawicki*, 20 Wis. 2d 308, 311 n.2, 121 N.W.2d 876, 878 n.2 (1963):

It is well settled by Wisconsin case law that the various freedoms preserved by sec. 1, art. I, Wis. Const., are substantially equivalent of the due process and equal-protection-of-the-laws clauses of the Fourteenth amendment to the United States constitution.

See also *Milwaukee v. Horvath*, 31 Wis. 2d 490, 495-96, 143 N.W.2d 446, 449 (1966):

This court has not been called upon to interpret the meaning of "involuntary servitude" in sec. 2, art. I, of the Wisconsin constitution. However, since both federal and Wisconsin provisions were patterned after the Northwest Ordinance of 1787, the decisions of the United States supreme court interpreting the Thirteenth amendment should also apply with equal force and effect to sec. 2, art. I. And this should be the case despite the fact that sec. 2, art. I, appeared in the original Wisconsin constitution of 1848, while the Thirteenth amendment was not adopted until after the Civil War.

11. See *McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 139, 121 N.W.2d 545, 548 (1963):

We observe . . . that a state may permit greater freedom of speech and press than the Fourteenth amendment would require, although it may not permit less. We recognize *Roth* [*Roth v. United States*, 354 U.S. 476 (1957)] and other decisions of the supreme court of the United States as completely binding upon us in determining whether the state violates the Fourteenth amendment in proscribing or suppressing a particular piece of material as obscene. Such decisions are eminent and highly persuasive, but not controlling, authority, on the meaning of the term "obscene" in our own statutes, and on the question of whether the proscription or suppression of a particular piece of material as obscene violates sec. 3, art. I of our state constitution.

12. See, e.g., Justice Abrahamson's concurring opinions in *Terry v. Percy*, 84 Wis. 2d 693, 697-700, 267 N.W.2d 380, 382-83 (1978), on remand from the United States Supreme Court, 434 U.S. 808 (1977), *vacating* *Terry v. Schubert*, 74 Wis. 2d 487, 247 N.W.2d 109 (1976); *Laasch v. State*, 84 Wis. 2d 587, 597-99, 267 N.W.2d 278, 284-85 (1978); and *State v. Starke*, 81 Wis. 2d 399, 420-23, 260 N.W.2d 739, 749-52 (1978). See also *State v. Doe*, 78 Wis. 2d 161, 254 N.W.2d 210 (1977); *State v. Taylor*, 60 Wis. 2d 506, 522-23, 210 N.W.2d 873, 882 (1973).

II. INTENT OF THE FRAMERS

Story stated "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties."¹³ Decisions of the Wisconsin Supreme Court are to the same effect.¹⁴ The intent to be discerned is that of the people who adopted the state constitution.¹⁵ "While this principle of construction is easily stated, its application is perilously difficult."¹⁶

Although the Wisconsin Supreme Court has paid lip service to the "plain meaning" rule, it has, at least in practice, recognized the necessity of going beyond the bare words of the constitutional provision at issue.¹⁷ The court has properly recognized that the text of the provision, read in the context of the whole constitution, is the starting point in ascertaining its meaning. But it also has been willing to consider any relevant evidence of the true meaning of the clause at issue.¹⁸

Thus, the antecedent and contemporary historical setting may be instructive.¹⁹ The debates and proceedings of the constitutional conventions of 1846 and 1848 are properly to be considered.²⁰ With important limitations, the early practical construction of the constitution by the various departments of government may be of value.²¹ Finally, the constitution is to be interpreted according to the broader purposes of the preamble and Declaration of Rights.²²

13. STORY, *supra* note 2, at 305.

14. See, e.g., *State ex rel. Zimmerman v. Dammann*, 201 Wis. 84, 88-89, 228 N.W. 593, 595 (1930):

The familiar and elementary rule that it is the duty of the court to discover and give effect to the intent of the legislature in construing a statute is equally applicable to the constitution, and the intent and purpose of the framers of the constitution should therefore be a guide to its application and interpretation.

15. See text accompanying notes 23-27 *infra*.

16. Antieau, *Constitutional Construction: A Guide to the Principles and Their Application*, 51 NOTRE DAME LAW. 358, 358 (1976) [hereinafter cited as Antieau].

17. See text accompanying notes 28-53 *infra*.

18. See text accompanying notes 53-86 *infra*.

19. See text accompanying notes 77-95 *infra*.

20. See text accompanying notes 89-106 *infra*.

21. See text accompanying notes 96-119 *infra*.

22. See text accompanying notes 120-46 *infra*.

III. THE INTENT TO BE ASCERTAINED IS THAT OF THE PEOPLE

In a 1925 decision the state supreme court said:

Perfection is an attribute solely of the Supreme Ruler of the universe; and because of the tendency for human beings to err, the necessity for construction has arisen and exists, and such construction is designed chiefly to ascertain the intention, in order that the voice of the people may receive proper recognition and that it may not be thwarted.²³

The preamble to the constitution itself declares, "We, the people of Wisconsin, . . . do establish this constitution."²⁴ And Cooley has said that "the object of construction, as applied to a written constitution, is to give effect to the intent of the people adopting it."²⁵

The Wisconsin decisions are in accord. In an 1849 case, *State ex rel. Dunning v. Giles*,²⁶ the court was faced with the construction of article XIV, section 2, providing for the continuance of territorial laws which are not "repugnant to this constitution." Matts was elected sheriff under a territorial statute limiting the office to one term. He received the highest number of votes in an election for the same office in the first election under the 1848 constitution. The losing party contended that the territorial statute was in force by virtue of article XIV, section 2, and that Matt's purported election was a nullity. The supreme court in an opinion written by Chief Justice Stow, held that the territorial statute was repugnant to the constitution.

On its face [the constitution] purports to be and in fact was, the work of the people—of the whole people—in which all had an equal and common interest and right, and to which all owed a common duty and allegiance; and I cannot believe

23. *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 196, 204 N.W. 803, 809 (1925). Cooley points out that construction of state constitutions is necessary, not only because of the "deficiencies of human language," but also because constitutional provisions must be applied "not only to the subjects directly within the contemplation of those who framed them, but also to a great variety of new circumstances which could not have been anticipated, but which must nevertheless be governed by the general rules which the instruments establish." T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 97 (8th ed. 1927), [hereinafter cited as COOLEY].

24. WIS. CONST., Preamble.

25. COOLEY, *supra* note 23, at 124 (emphasis in original).

26. 2 Pin. 166, 1 Chand. 112 (1849).

that a constitution thus broad and catholic ever meant, by adopting an old provincial law, to extend the political disabilities of certain *inhabitants* of the territory to the *citizens* of the State.²⁷

In the 1890 Bible-reading decision, the court responded to a school board's argument that exclusion of Bible reading from public schools detracted from the values of the Bible and religion, by stating that the proper place for such teachings is in the churches and homes.

The constitution does not interfere with such teaching and culture. It only banishes theological polemics from the district schools. It does this, not because of any hostility to religion, but because the people who adopted it believed that the public good would thereby be promoted, and they so declared in the preamble.²⁸

IV. THE PLAIN MEANING MAXIM

Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation. It is only where there is some ambiguity or doubt arising from other sources that interpretation has its proper office.²⁹

Chief Justice Dixon, speaking for the Wisconsin court in 1872, stated:

The office of interpretation is to bring out the sense where the words used are in some manner doubtful, and where these are plain and unambiguous the court cannot depart from the language of the statute. . . . It is only where the intention of the legislature is ambiguously expressed, so as to be fairly capable of two or more meanings, that interpretation or any latitude of construction is allowable.³⁰

The classic statement of the plain meaning maxim contains several important limitations and exceptions. Initially, the meaning of the words must truly be "plain." Wisconsin's Justice Marshall, after restating the plain meaning rule added:

27. *Id.* at 169-70 (emphasis in original).

28. *State ex rel. Weiss v. District Bd. of School Dist. No. 8*, 76 Wis. 177, 202, 44 N.W. 967, 976 (1890).

29. STORY, *supra* note 2, at 306.

30. *Mundt v. Sheboygan & F. du L. R.R. Co.*, 31 Wis. 451, 457 (1872).

The language of the law is not necessarily free from ambiguity merely because looking thereto alone no uncertainty of meaning appears. Ambiguity, as has often been said, may as well spring from the effect that would result by applying a law in its literal sense, as from obscurity of expression in the words themselves. . . .

. . . .

One of the familiar principles to be applied in determining whether words of a law which are plain on their face are ambiguous nevertheless, is that it must always be presumed that the lawmakers did not intend anything clearly unreasonable or absurd.³¹

Because a constitution, unlike a statute, is primarily a declaration of general principles intended to endure, it is difficult to perceive of a truly plain and unambiguous constitutional provision.³²

Within the classic formulation of the plain meaning rule, uncertainty of meaning may arise, due to conflicts with other clauses in the same instrument, or from incongruities between the words and the apparent intention of the whole instrument or its avowed object.³³

In order to effectuate the purpose intended by the people, the Wisconsin court has often gone beyond the plain literal meaning of the constitution. In *State ex rel. Martin v. Heil*,³⁴ the court construed article V, section 7, which provides "In case of the impeachment of the governor, . . . or his . . . death . . ., the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term . . .," to allow for the succession of the lieutenant governor where the governor-elect died before taking office. The court, by Justice Wickhem, said:

It is extremely important in the interpretation of constitutional provisions that we avoid determinations based purely on technical or verbal argument and that we seek to discover the true spirit and intent of the provisions examined. We must not fail to give effect to plain and completely unambi-

31. *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 504-05, 111 N.W. 712, 714 (1907).

32. See *State ex rel. Postel v. Marcus*, 160 Wis. 354, 152 N.W. 419, *rev'd on rehearing*, 160 Wis. 380, 152 N.W. 428 (1915).

33. STORY, *supra* note 2, at 306.

34. 242 Wis. 41, 7 N.W.2d 375 (1941).

guous language in the constitution, *but where there is a reasonable ground to differ concerning the sense in which language is used, the provision should be examined in its setting in order to find out, if possible, the real meaning and substantial purpose of those who adopted it.*³⁵

The court went on to consider the proceedings of the constitutional convention and the early practical construction of the legislature and concluded that a reasonable construction of the section provided for succession as well as the reasons for the creation of the office of lieutenant governor.

To the extent that it purports to exclude consideration of extrinsic aids in the construction of state constitutional provisions, the plain meaning rule probably has been rejected in Wisconsin. Two recent education cases are illustrative. In the 1974 case, *Board of Education v. Sinclair*,³⁶ the state supreme court held that public schools could charge pupils for book rentals without violating the provision of article X, section 3: "[District] schools shall be free and without charge for tuition to all children" The language of the text of the provision received brief discussion, with the court's decision being based primarily upon the practices prevailing in 1848 and the early practical construction by the legislature.

Two years later, in *Buse v. Smith*,³⁷ involving recently enacted negative-aid provisions for school district financing,³⁸ the court stated:

In its interpretation of constitutional provisions this court is committed to the method of analysis utilized in *Board of Education v. Sinclair*, *supra*. The court will view:

- (1) The plain meaning of the words in the context used;
- (2) The historical analysis of the constitutional debates and of what practices were in existence in 1848, which the court may reasonably presume were also known to the framers of the 1848 constitution. . . ; and

35. *Id.* at 55 (emphasis added).

36. 65 Wis. 2d 179, 222 N.W.2d 143 (1974).

37. 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

38. Wis. STARS. §§ 121.07-.08 (1973) provided that negative-aid districts were required to pay a portion of revenues raised by local tax levies into the state fund to be commingled with state revenues and disbursed as state aids to positive-aid districts.

The court in *Buse* held that the statutes violated art. VIII, sec. 1: "The rule of taxation shall be uniform"

(3) The earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution.³⁹

This is consistent with Wisconsin Justice Doerfler's statement in 1925 that "where a doubt is raised either from the language employed or from the history of the enactment, or from the object and purpose it is designed to achieve, these elements may be taken into consideration in order to establish the intention."⁴⁰

But the language of the constitution is to be the primary source in ascertaining meaning. In the 1855 case of *Attorney General ex rel. Bashford v. Barstow*,⁴¹ the court held that it had the power under the state constitution to oust the incumbent governor in a quo warranto proceeding, despite indications from the incumbent governor that, as head of the executive department, he would not honor the court's mandate.⁴² Chief Justice Whiton responded as follows to the governor's reliance upon proceedings of the federal constitutional convention and the ratifying state conventions and the writings of political essayists:

39. *Buse v. Smith*, 74 Wis. 2d 550, 568, 247 N.W.2d 141, 149 (1976) (citations omitted).

40. *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 192, 204 N.W. 803, 808 (1925).

41. 4 Wis. 567 [*567] (1855).

42. Matthew Carpenter, Governor Barstow's attorney, argued:

As it cannot for a moment be conceded that in a conflict of power between the judicial and executive departments of the government, the judiciary has the sole right to judge the contest, or any better or further right than the executive, to judge of the relative powers of the two departments, the governor will, in reviewing the whole subject, carefully examine the decision of this court, giving to the opinions of the judges, in the language of President Jackson, "only such influence as the force of their reasoning may deserve." He will then be obliged to determine for the executive branch of the government, 1st, whether this court can exercise original jurisdiction over any suit commenced by an information in the nature of *quo warranto*; and 2d, if so, whether this writ can, in any case, be directed to the executive of the state.

If he should, when assisted by the reasoning of the judges, come to the same conclusion, he may send us here to your honors' bar again. Should he, however, be so unfortunate as to be compelled to an opposite determination, he would be bound by his official oath of fidelity to the constitution, to regard the proceedings of this court as unwarranted by the constitution, and a gross usurpation of power; and to treat any judgment this court may presume to render therein as an absolute nullity.

Id. at 629 [*620-21].

But it must be apparent, that, as the sovereign people of this state have adopted a written constitution, in which the powers of the government are distributed among the departments established, and which is the supreme law of the land, we must look to that instrument for the purpose of determining this question.⁴³

Justice Smith stated:

Let us then look to that constitution, adopted by the people of Wisconsin, and endeavor to ascertain its true intent and meaning, the distribution of the powers of government which *it has in fact made* We made it ourselves. We are bound to abide by it, until altered, amended or annulled, and we must construe it, and support it, not according to the vague, conjectural hypothesis of volunteer expounders, resident in other states, having no care or interest in the government, and having no knowledge of the constitution of our state, but according to its plain letter and meaning The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs—let us construe, and stand by ours.⁴⁴

In 1881 Justice Cassoday, in response to the parties' discussion of the "grave consequences" of sustaining or voiding an act under the uniformity of taxation clause of article VIII, section 1, stated:

The real question. . . is: What words are employed? What command to they utter? . . . [I]t is the plain duty of the court to find out, if possible, the extent of the inhibition upon the legislature in prescribing the property which shall be subject to taxation, and then, in the light of the authorities, proclaim it.⁴⁵

V. THE SENSE IN WHICH WORDS ARE USED

Words or terms used in a constitution, being dependent on ratification by the people, must be understood in the sense

43. *Id.* at 671 [*657].

44. *Id.* at 785 [*757-58] (emphasis in original).

45. *Wisconsin Cent. R.R. v. Taylor County*, 52 Wis. 36, 58, 8 N.W. 833, 837 (1881). See also *Bond v. French*, 2 Pin. 181, 184, 1 Chand. 130, ____ (Wis. 1849), per Stow, C.J.: "In deciding this question, our only guide is the constitution, in construing which we are to be governed by the same general rules of the interpretation which prevail in relation to statutes."

most obvious to the common understanding at the time of its adoption, although a different rule might be applied in interpreting statutes and acts of the legislature. . . . [I]t is presumed that words appearing in a constitution have been used according to their plain, natural, and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of a constitution in order to search for some other conjectured intent.⁴⁶

The case involved the construction of article VIII, section 8, requiring a record "yea and nay" vote for any act which "makes. . . an appropriation of *public or trust money*" in the public treasury. A 1923 worker's compensation statute required the employer to pay death benefits into the state treasury when a covered worker died with no dependents. The bill was passed without a record vote. The court conceded that the monies appropriated were "trust money" in a technical sense but stated that the real inquiry was into the obvious understanding of those who voted on the provision.⁴⁷ The court held that the appropriation did not involve "trust money."

Regarding the rule that words used in a constitution are construed in their common sense, Story stated:

Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.⁴⁸

46. *B.F. Sturtevant Co. v. Industrial Comm'n*, 186 Wis. 10, 19, 202 N.W. 324, 327 (1925).

47. *Id.*

48. STORY, *supra* note 2, at 345.

In a similar vein, Cooley states:

Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government (footnote omitted).

COOLEY, *supra* note 23, at 131-32.

The common sense in which the words are employed in a constitution adopted by the people may not be distorted by an arbitrary application of maxims of construction "which savor rather of the closet than of practical life."⁴⁹ Thus, in *Nunnemacher v. State*,⁵⁰ the Wisconsin court rejected arbitrary application of the maxim *expressio unius est exclusio alterius* with the observation that:

[T]his rule, like all other mere rules of construction applied to ambiguous words, yields to proof of surrounding facts and circumstances which satisfactorily demonstrates that the meaning intended by the parties was different.⁵¹

Similarly, in a 1930 decision, Chief Justice Rosenberry, for the court, rejected an interpretation of the word "officer" as having the same meaning in the various provisions of the constitution in which it appears, stating:

It is considered that a question of such a weighty and far-reaching character as that under consideration here ought not to be determined by the consideration of small and comparatively inconsequential matters.⁵²

However, where technical words are used, having a meaning established at common law when the provision was adopted, the technical meaning is properly applied.⁵³ The principle is well illustrated in a 1925 decision, *State ex rel. Allis v. Wiesner*,⁵⁴ involving the construction of article XI, section 2, which then provided "No municipal corporation shall take private property for public use, against the consent of the owner, without the necessity thereof being first established by the ver-

49. COOLEY, *supra* note 23, at 171:

It will be perceived that we have not thought it important to quote and to dwell upon those arbitrary rules to which so much attention is sometimes given, and which savor rather of the closet than of practical life. Our observation would lead us to the conclusion that they are more often resorted to as aids in ingenious attempts to make the constitution seem to say what it does not, than with a view to make that instrument express its real intent.

50. 129 Wis. 190, 108 N.W. 627 (1906).

51. *Id.* at 214, 108 N.W. at 634.

52. *State ex rel. Zimmerman v. Dammann*, 201 Wis. 84, 95, 228 N.W. 593, 597 (1930). See also STORY, *supra* note 2, at 346-47.

53. STORY, *supra* note 2, at 346. But where a word has both a common and a technical sense, "the latter is to be preferred, unless some attendant circumstance points clearly to the former."

54. 187 Wis. 384, 204 N.W. 589 (1925).

dict of a jury.”⁵⁵ At issue was a 1914 Milwaukee Charter provision providing for a “jury” in eminent domain proceedings which did not act under the direction of a court. The Wisconsin Supreme Court concluded that this was not a “jury” within the meaning of the constitution by reference to common law. Chief Justice Rosenberry stated “where technical terms were in use prior to the adoption of the Constitution, such terms were used in the Constitution in the sense in which they were understood at common law.”⁵⁶ The court emphatically rejected the contention that “it is a historical fact that the word ‘jury’ was carelessly used around the time of the adoption of the Constitution in 1848”⁵⁷ Instead it stated:

Having in mind the state of the law at the time of the adoption of the Constitution, it is not conceivable that the framers of that document intended to use the term “jury” other than as applicable to a body of 12 men charged with a duty of finding certain facts under the direction of a court. Had the framers of the Constitution intended to provide for a jury of inquest, one quite as well known at the common law as a petit jury, they would have used that term.⁵⁸

In *In re Cannon*⁵⁹ the Wisconsin Supreme Court refused to recognize an act of the legislature reinstating to practice an attorney suspended by the court. Article VII, section 2, merely provides that the judicial power is vested in the courts, without defining the term “court.” The supreme court reviewed English common law at length, and concluded:

So when the term “court” is used in the constitution it is plain that the framers had in mind that governmental institution known to the common law possessing powers characterizing it as a court and distinguishing it from all other institutions.⁶⁰

The Wisconsin Supreme Court has frequently resorted to technical pre-existing common-law definitions in its construction of the constitutional provisions that, in civil cases, “the

55. By 1961 amendment “by the verdict of a jury” was replaced with “in the manner prescribed by the legislature.”

56. *State ex rel. Allis v. Wiesner*, 187 Wis. 384, 394, 204 N.W. 589, 593 (1925).

57. *Id.*

58. 187 Wis. at 396, 204 N.W. at 594.

59. 206 Wis. 374, 240 N.W. 441 (1932).

60. *Id.* at 393, 240 N.W. at 449.

right of trial by jury shall remain inviolate”⁶¹ and that “writs of error shall never be prohibited.”⁶² This seems particularly appropriate since the provisions, by their terms, must relate to the law as it existed at the time of the adoption of the constitution.

The Wisconsin Supreme Court has, however, recognized that, in construing the Wisconsin Constitution, it will not be bound by common-law practices which do not conform to our present concepts of individual rights. The proposition was well stated by Justice Owen in 1922:

In all matters touching the affairs of government and the liberty of the citizen we are apt to go astray if we proceed upon the assumption that as to such matters we are governed by the principles of the common law, for the reason that our fundamental notions of the rights of the individual, of the liberty of the citizen, and of the repository of sovereign power do not conform to the spirit in which the principles of the common law were generated and developed.⁶³

VI. EXAMINATION OF THE WHOLE INSTRUMENT

It is elementary that, in the construction of constitutions “the whole is to be examined with a view to arriving at the true intention of each part”⁶⁴ *State ex rel. Reynolds v. Zimmerman*,⁶⁵ is instructive. In 1963 the legislature by joint resolution, without the concurrence of the governor, provided for the apportionment of Wisconsin legislative districts. Article V, section 10, requires that before a bill becomes law it shall be presented to the governor. The provision relating to apportionment of federal congressional districts⁶⁶ requires that such apportionment be “provided by law,” while the provision dealing with apportionment of Wisconsin legislative districts⁶⁷ con-

61. See *Norval v. Rice*, 2 Wis. 17, 22 [*22, *29] (1853).

62. See *Aetna Accident & Liab. Co. v. Lyman*, 155 Wis. 135, 137, 144 N.W. 278, 279 (1913).

63. *State ex rel. Rodd v. Verage*, 177 Wis. 295, 322, 187 N.W. 830, 841 (1922).

64. COOLEY, *supra* note 23, at 127. See also *Student Ass'n, Univ. of Wis.-Milw. v. Baum*, 74 Wis. 2d 283, 294-95, 246 N.W.2d 622, 627 (1976), involving statutory construction:

[T]he cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act.

65. 22 Wis. 2d 544, 126 N.W.2d 551 (1964).

66. WIS. CONST. art. XIV, § 10.

67. WIS. CONST. art. IV, § 3.

tains no such "by law" language, merely providing that "the legislature shall apportion." The respondent made a cogent argument, based upon the text of the provision, that the express inclusion of the words "by law" in the congressional apportionment clause and their absence from the state legislative apportionment clause indicated the intent of the framers of the constitution to allow the legislature to apportion the state legislature either by law with the concurrence of the government or, as was done here, by joint resolution.⁶⁸ In rejecting this contention, the court examined the various provisions of the constitution providing for important legislative functions and stated that:

[W]e must construe sec. 3, art. IV in the most reasonable manner in relation to the fundamental purpose of the constitution *as a whole*, to wit: To create and define the institutions whereby a representative democratic form of government may effectively function.⁶⁹

In support of the court's conclusion that Bible reading in public schools is violative of the state constitution, Justice Orton, in a separate opinion, referred to numerous provisions of the state constitution dealing generally with religion and education and stated:

These provisions of the constitution are cited together to show how completely this state, as a civil government, and all its civil institutions, are divorced from all possible connection or alliance with any and all religions, religious worship, religious establishments, or modes of worship, and with everything of a religious character or appertaining to religion⁷⁰

Since it must be assumed that the people have expressed themselves carefully in written constitutions, every clause and word of the constitution must be construed so as to have force and meaning.⁷¹

Article VI, section 4, provides for the election of certain

68. 22 Wis. 2d at 554, 126 N.W.2d at 557.

69. *Id.* at 555, 126 N.W.2d at 558 (emphasis added).

70. *State ex rel. Weiss v. District Bd. of School Dist. No. 8*, 76 Wis. 177, 217-18, 44 N.W. 967, 981 (1890).

71. *State ex rel. Attorney Gen. v. Cunningham*, 81 Wis. 440, 515, 51 N.W. 724, 740 (1892) (Pinney, J., concurring). See also *Rowan v. State*, 30 Wis. 129, 145 (1872) and COOLEY, *supra* note 23, at 129.

county officers, including sheriffs, and for their removal from office by the governor. The removal portion omits any reference to "for cause" or similar language. In *State ex rel. Rodd v. Verage*,⁷² the state court held that the governor could not remove a sheriff except "for cause."

The constitution provides that the officers referred to shall be chosen by the qualified electors of the county. Having so provided, it does not seem likely that a provision would be inserted affording an opportunity for its complete nullification. If the provision we are considering is to be construed as conferring arbitrary power of removal upon the governor, then it is apparent that the governor may remove county officers who are distasteful to him from personal, political, or other reasons and install officers of his own choosing to discharge the official functions of these various county officers.⁷³

Because a state constitution, unlike the federal constitution, is designed to limit the powers of the departments of state government,⁷⁴ each of its provisions are presumed to be mandatory rather than merely directory.⁷⁵ "The convention, in making a constitution, had a higher duty to perform than to give the legislature advice."⁷⁶

VII. ANTECEDENT AND CONTEMPORARY HISTORY

The Wisconsin Supreme Court has consistently recognized that, in the construction of a provision of the state constitution, the intent of the framers cannot be discovered merely by look-

72. 177 Wis. 295, 187 N.W. 830 (1922).

73. *Id.* at 299-300, 187 N.W. at 832-33.

74. *See, e.g., Wisconsin Cent. R.R. v. Taylor County*, 52 Wis. 37, 59, 8 N.W. 833, 837 (1881):

Bearing in mind a rule of construing a state constitution, often asserted by this and other courts, that such constitution is not, like the constitution of the United States, a grant of power, but rather a limitation upon the powers of the state legislature

75. *COOLEY*, *supra* note 23, at 159. *See also State ex rel. Postel v. Marcus*, 160 Wis. 354, 370-71, 152 N.W. 419, 425 (1915).

76. *State ex rel. Attorney Gen. v. Cunningham*, 81 Wis. 440, 485, 51 N.W. 724, 730 (1892). In a separate opinion Justice Pinney stated:

It does not appear that the language used was employed by way of exhortation to the legislature to eschew the pernicious methods of gerrymandering, then recognized as an evil to be greatly deplored. It better suits the important character of the rights sought to be guarded, and the character and purpose of the instrument, to regard these provisions as mandatory and not directory merely.

Id. at 513-14, 54 N.W. at 739.

ing at the words of the clause alone without ascertaining the purpose of the whole instrument in view of the circumstances which gave rise to the particular clause.⁷⁷ The rule was well stated by Justice Cassoday in *State ex rel. Weiss v. District Board of School District No. Eight*, quoting with approval federal decisions:

It is undoubtedly true. . . that "in the construction of the constitution we must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief, and the remedy" "Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each, just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."⁷⁸

After a discussion of the need in 1848 to populate the state and the increasing migration of diverse groups, many of whom were fleeing from religious intolerance,⁷⁹ Justice Lyons stated:

77. *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 184, 204 N.W. 803, 805 (1925). Wisconsin has apparently rejected Cooley's statement that extrinsic evidence of contemporary circumstances may only be resorted to in order to resolve ambiguity and that an ambiguity cannot be created by resort to such a historical analysis. COOLEY, *supra* note 23, at 141.

78. 76 Wis. 177, 203, 44 N.W. 967, 976 (1890) (emphasis in original)(citations omitted).

79. *Id.* at 197-98, 44 N.W. at 974. The actual language of the court, by Justice Lyon, is worth considering in full:

It may not be uninformative to consider somewhat certain other circumstances, existing when the constitution was adopted, which may fairly be presumed to have influenced the inserting therein of the provision against 'sectarian instruction' in the district schools. The early settlers of Wisconsin came chiefly from New England and the Middle States. They represented the best religious, intellectual, and moral culture, and the business enterprise and sagacity, of the people of the states from whence they came. They found here a territory possessing all the elements essential to the development of a great state. They were intensely desirous that the future state should be settled and developed as rapidly as possible. They chose from their number wise, sagacious, Christian men, imbued with the sentiments common to all, to frame their constitution. The convention assembled at a time when immigration had become very large and was constantly increasing. The immigrants came from nearly all the countries of Europe, but most largely from Germany and Ireland. As a class, they were industrious, intelligent, honest, and thrifty—just the material for the development of a new state. Besides, they brought with them, collectively, much wealth. They were also religious and sectarian. Among them were Catholics,

Such were the circumstances surrounding the convention which framed the constitution. In the light of them, and with a lively appreciation by its members of the horrors of sectarian intolerance and the priceless value of perfect religious and sectarian freedom and equality, is it unreasonable to say that sectarian instruction was thus excluded, to the end that the child of the Jew, or Catholic, or Unitarian, or Universalist, or Quaker should not be compelled to listen to the stated reading of passages of scripture which are accepted by others as giving the lie to the religious faith and belief of their parents and themselves?⁸⁰

In construing amendments to the state constitution, the court has considered the actual questions submitted to the voters⁸¹ and the recitals in the published notices.⁸² A potentially valuable means of ascertaining the purpose of provisions of the state constitution could be by reference to contemporary news accounts.⁸³ The 1848 constitution, for the most part, closely paralleled the one rejected in 1846.⁸⁴ The proceedings of the 1846 convention were "systematically reported" by the newspapers and "the people of the territory took a lively interest in the course of the proceedings"⁸⁵ The provisions of the

Jews, and adherents of many Protestant sects. These immigrants were cordially welcomed, and it is manifest the convention framed the constitution with reference to attracting them to Wisconsin. Many, perhaps most, of these immigrants came from countries in which a state religion was maintained and enforced, while some of them were nonconformists and had suffered under the disabilities resulting from their rejection of the established religion. What more tempting inducement to cast their lot with us could have been held out to them than the assurance that, in addition to the guaranties of the right of conscience and of worship in their own way, the free district schools in which their children were to be, or might be, educated, were absolute common ground, where the pupils were equal, and where sectarian instruction, and with it sectarian intolerance, under which they had smarted in the old country, could never enter?

80. *Id.* at 198, 44 N.W. at 974-75.

81. *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 183-84, 204 N.W. 803, 805 (1925).

82. *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 607, 37 N.W.2d 473, 477 (1949).

83. *See State ex rel. Thomson v. Giessel*, 262 Wis. 51, 67-68, 53 N.W.2d 726, 733-34 (1952), where Justice Currie, in dissent, refers to a news article circulated prior to the 1846 ratification vote to ascertain "what evils did the framers seek to prevent by the language employed."

84. Brown, *The Making of the Wisconsin Constitution*, 1949 Wis. L. Rev. 648, 655 n. * [hereinafter cited as Brown].

85. *Id.* at 660.

1846 constitution received extensive and detailed press coverage prior to the ratification vote.⁸⁶

An understanding of the conditions and concerns which gave rise to the constitution is helpful, but, since the constitution deals with principles, its provisions must be construed in the light of evolving conditions and values. "[A] principle to be vital must be capable of wider application than the mischief which gave it birth."⁸⁷ Justice Barnes of the Wisconsin Supreme Court stated in 1910:

It is highly improbable that our constitution makers intended that any such result would follow from a provision practically taken from the English Bill of Rights, and which was framed to meet grave abuses of a very different character. Such intention would entirely ignore those altered conditions which the mutations of time bring about, and would be tantamount to an egotistical declaration that when the constitution was framed the millenium had arrived and progress had reached its ultimate goal.⁸⁸

The Wisconsin Supreme Court has frequently resorted to the debates and proceedings of the 1846 and 1848 constitutional conventions.⁸⁹ Justice Marshall stated for the court in 1915:

Commonly, the debates in constitutional conventions have been referred to for the purpose of discovering the full meaning intended to be embodied therein. . . . We must look to the history of the subject as they had it before them and all the circumstances characterizing their action, particularly as appears upon the journal of the convention. In short, we must strive by all means within our jurisdiction to put ourselves in the place the constitution makers occupied,—look at the situation they had in view through the same vista they observed it, and then read out of the term the meaning they sought to embody in it.⁹⁰

86. *Id.* at 692-93.

87. *Weems v. United States*, 217 U.S. 349, 373 (1910).

88. *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 338-39, 125 N.W. 961, 968 (1910).

89. *See, e.g., Martin v. Heil*, 242 Wis. 41, 55-58, 7 N.W.2d 375, 381-82 (1942); *Estate of Payne*, 208 Wis. 142, 145-46, 242 N.W. 553, 554-55 (1932); *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 289-90, 221 N.W. 860, 862 (1928); *State ex rel. Owen v. Donald*, 160 Wis. 21, 72, 151 N.W. 331, 347 (1915); *Nunnemacher v. State*, 129 Wis. 190, 206-14, 108 N.W. 627, 631-34 (1906).

90. *State ex rel. Owen v. Donald*, 160 Wis. 21, 81, 151 N.W. 331, 350 (1915).

The proceedings of the convention of 1846 are especially helpful.

Although the constitution framed by this convention was rejected by the people, extended discussion of its proceedings is appropriate. In essential details the 1848 constitution followed closely the rejected predecessor. Also the framing of the 1846 constitution brought more sharply into focus the vital political, economic and social issues of the period than did its successor. After the 1846 convention, that of 1848, in matter of public interest, was largely an anti-climax.⁹¹

Amid extensive newspaper discussion, the 1846 constitution was defeated by the people by a vote of 20,333 in favor and 14,119 opposed to ratification.⁹² The 1848 constitution, amid "a mood almost of apathy," was approved by a vote of 16,417 to 6,184.⁹³

The court has also considered earlier constitutional provisions and proceedings from other states, particularly New York, in construing the later-adopted sections of the Wisconsin Constitution. Justice Cassoday stated for the court in 1881:

Our constitutional convention contained many able men, and several able lawyers. In the important work of devising and adopting a constitution, we must assume that they carefully examined the constitutions of the several states⁹⁴

However, even where the court has found that the Wisconsin provision at issue was directly taken from that of New York, it has rejected the construction of the New York courts.⁹⁵

VIII. PRACTICAL CONSTRUCTION

The Wisconsin Supreme Court has frequently looked to the early and continuous practices of legislative, administrative, and executive bodies and officials under a provision of the constitution as an aid in its interpretation. Chief Justice Dixon's statement in the 1872 case of *Dean v. Borchsenius*⁹⁶ has been

91. Brown, *supra* note 84, at 655 n.*.

92. *Id.* at 692, 693.

93. Brown, *The Making of the Wisconsin Constitution Part Two*, 1952 WIS. L. REV. 23, 62.

94. Wisconsin Cent. R.R. v. Taylor County, 52 Wis. 36, 62, 8 N.W. 833, 839 (1881).

95. B.F. Sturtevant Co. v. Industrial Comm'n, 186 Wis. 10, 17, 202 N.W. 324, 326 (1925).

96. 30 Wis. 236 (1872).

frequently quoted.

The uninterrupted practice of a government prevailing through a long series of years, and the acquiescence of all its departments, legislative, executive and judicial, sometimes become imperative even on constitutional questions.⁹⁷

This practical construction is a particularly useful aid in interpretation when the governmental action is nearly contemporaneous with the adoption of the constitutional provision at issue.⁹⁸

The application and rationale are well stated in *Schultz v. Milwaukee County*.⁹⁹ The issue was the validity of a statute depriving county coroners (who are constitutional officers under article VI, section 4) of jurisdiction to hold inquests. Coroners had had such jurisdiction under the territorial statutes, but exclusive jurisdiction to hold inquests was for a time conferred upon justices of the peace by chapter 152, statutes of 1849, enacted by the first legislature under the constitution. The court noted that "[t]here were a number of members of the constitutional convention in the legislature of 1849" and concluded:

If vesting the right to hold inquests in a justice of the peace instead of a coroner was an exercise of power denied to the legislature by the constitution, the men who framed the constitution who were then serving in the legislature, would certainly have protested.¹⁰⁰

A 1949 decision, *State ex rel. Frederick v. Zimmerman*,¹⁰¹ presented the Wisconsin Supreme Court with a particularly compelling case for the application of the doctrine of practical construction. Unless the legislature's construction of the provi-

97. *Id.* at 246. See also *Bashford v. Frear*, 138 Wis. 536, 556, 120 N.W. 216, 223 (1909):

It requires a very clear case to justify changing the construction of a law, conceded to be somewhat involved, which has been uninterruptedly acquiesced in, for so long a period as fifty years.

98. *Estate of Payne*, 208 Wis. 142, 142, 242 N.W. 553, 553 (1932). See also *Board of Educ. v. Sinclair*, 65 Wis. 2d 179, 184, 222 N.W.2d 143, 146 (1974); *State v. Coubal*, 248 Wis. 247, 256, 21 N.W.2d 381, 386 (1945); and *Antieau*, *supra* note 16, at 382: "The value of this constructional aid grows weaker as years intervene between ratification of the constitutional clause and the proffered practice"

99. 245 Wis. 111, 13 N.W.2d 580 (1944).

100. *Id.* at 119, 121, 13 N.W.2d at 583-84.

101. 254 Wis. 600, 37 N.W.2d 472 (1949).

sion at issue was correct, no justice of the supreme court had been legally elected to office since 1889.¹⁰²

The supreme court has given great weight to "the view of the constitutional allocations of power adopted by the political branches of government" in issues relating to the relative powers of coordinate branches of government.¹⁰³ The rationale was well stated by Chief Justice Rosenberry in 1943:

From the beginning those who have been charged with the duty of exercising the various governmental powers have recognized that the constitution is primarily a set of principles and not of rules; that in the application of these principles there must be co-operation between the several departments in adapting the constitutional principles to the practical affairs of government in order to make the government workable.¹⁰⁴

But in the final analysis, it is the judicial department that must decide questions of constitutional construction, irrespective of the practice of the other departments of government. Justice Marshall stated:

A constitution would be of little protection to the people against their representatives who might for a time lose sight of the wise limitations of the fundamental law, if the very result of the infraction could be successfully held up to intimidate those who are charged with the duty of rectifying the mischief.¹⁰⁵

102. *Id.* at 611, 37 N.W.2d at 479. The issue was the validity of a 1949 statute which, for the first time, required a primary election when there were more than two nominees for the office of supreme court justice. An 1889 amendment to article VII, section 4, provided for a supreme court of five justices "to be elected as now provided." The relator argued that "now provided" incorporated the then-existing statutes relating to elections of justices and precluded the legislature from thereafter changing the method of election. *Id.* at 607, 37 N.W.2d at 477. The court, in rejecting this contention, relied heavily upon the legislature's construction by its enactment of several statutes commencing in 1889 which made changes in the manner in which justices were elected. Every sitting justice had been elected under these statutes subsequent to 1889. *Id.* at 608-11, 37 N.W.2d at 477-79.

103. *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 558, 126 N.W.2d 551, 559 (1964). See also *Integration of Bar Case*, 244 Wis. 8, 31, 11 N.W.2d 604, 615 (1943): In matters of legislative procedure this court has attached great weight to long-continued legislative practice as affecting the construction of a section of the constitution.

104. *Integration of Bar Case*, 244 Wis. 8, 46, 11 N.W.2d 604, 621 (1943). But the court refused to continue to acquiesce in the continued usurpation of judicial power. See note 119 *infra*.

105. *State ex rel. Owen v. Donald*, 160 Wis. 21, 72, 151 N.W. 331, 347 (1915).

Justice Timlin expressed a similar sentiment in 1910:

The advisory office of practical construction of a constitution by other departments of government must, in the nature of things, be limited to the very case theretofore passed upon. Otherwise a single infraction of the constitution long acquiesced in might break down the whole instrument.¹⁰⁶

The Wisconsin court has recognized that:

A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question¹⁰⁷

In *State ex rel. Weiss v. District Board of School District No. Eight*,¹⁰⁸ the school board presented evidence of the continuous and uniform practice of the department of public instruction, commencing in 1858, of recommending the Bible as a textbook in public schools. The court said that its construction of the constitution could not be controlled by the administrative practice, stating:

The fact probably is that the practice of Bible reading in the district schools was not seriously challenged at the outset, and not subjected to close legal scrutiny until the policy of the department had become fixed.¹⁰⁹

Contemporaneous and practical construction by other departments of government lose force where such construction has not been uniform¹¹⁰ or where such construction has not been acquiesced in by the judiciary.¹¹¹ Mere deference to the interpretation of a provision by other departments of government cannot save an unconstitutional enactment,¹¹² for "[l]aw-

106. *In re Appointment of Revisor*, 141 Wis. 592, 631, 124 N.W. 670, 684 (1910) (Timlin, J., dissenting).

107. COOLEY, *supra* note 23, at 150; see also *Estate of Payne*, 208 Wis. 142, 146, 242 N.W. 553, 555 (1932).

108. 76 Wis. 177, 196, 44 N.W. 967, 974 (1890).

109. *Id.*

110. *State ex rel. Allis v. Wiesner*, 187 Wis. 384, 398, 204 N.W. 589, 595 (1925).

111. *Lawrence Univ. v. Outagamie County*, 150 Wis. 244, 251, 136 N.W. 619, 622 (1912).

112. *Stierle v. Rohmeyer*, 218 Wis. 149, 166-67, 260 N.W. 647, 654-55 (1935); *Estate of Payne*, 208 Wis. 142, 146, 242 N.W. 553, 555 (1932); *State ex rel. Attorney Gen. v. Cunningham*, 81 Wis. 440, 516, 51 N.W. 724, 740 (1892) (Pinney, J., concurring).

breaking is none the less law-breaking because it is grayheaded with age"¹¹³

The early Wisconsin cases in which the doctrine was developed must be read with care. These cases often purport to give a stare decisis effect to the meaning adopted by the practices of the legislative and executive departments in the construction of the constitution. Thus, the classic statement of the doctrine in *Dean v. Borchsenius*,¹¹⁴ was preceded by the observation that:

Every city and village charter passed since the foundation of the state, a period of nearly twenty-five years, during which all of our cities and villages have grown up and been organized, and every act done under such charters in respect of the improvement of streets, must inevitably fall and be adjudged unconstitutional and void.¹¹⁵

It is well to remember that these cases were decided in an era when a decision holding a law unconstitutional rendered the law void *ab initio* and invalidated all actions taken in reliance upon such law.¹¹⁶ This harsh result has been ameliorated by the subsequently-developed doctrine of prospective overruling.¹¹⁷

Construction of the constitution by other departments of the government "can never abrogate the text. . . can never fritter away its obvious sense. . . can never narrow down its true limitations. . . can never enlarge its natural boundaries."¹¹⁸ Practical construction demonstrates only the meaning accorded to the constitution by the state officer or department

113. *In re Appointment of Revisor*, 141 Wis. 592, 602, 124 N.W. 670, 673 (1910).

114. 30 Wis. 236 (1872).

115. *Id.* at 246. See also *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 513, 111 N.W. 712, 717 (1907) ("The last phase of the case mentioned we deem of special importance, since there are many important laws which might otherwise be fatally affected.").

116. See, e.g., *Kneeland v. City of Milwaukee*, 15 Wis. 497, 505 (1862).

117. See Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: 'Prospective Overruling' or 'Sunbursting'*, 51 MARQ. L. REV. 254 (1967). See also *Holland v. State*, 87 Wis. 2d 567, 599-600, 275 N.W.2d 162, 178 (Ct. App.), *rev'd on other grounds*, 91 Wis. 2d 134, 280 N.W.2d 288 (1979). Cf. *Smith v. Allwright*, 321 U.S. 649, 665 (1944):

[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.

118. STORV, *supra* note 2, at 310.

engaging in the practice, which may or may not accord with the intent of the people in adopting the constitutional provision.¹¹⁹

IX. THE BROADER PURPOSES OF THE DECLARATION OF RIGHTS

The constitution of 1848 opened the Declaration of Rights with:

All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.¹²⁰

and closed it with: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."¹²¹ This is an express recognition that individual rights are not created by the constitution, but rather that the constitution was framed to prevent their loss or diminution by the government about to be established. Cooley stated:

In considering State constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed.¹²²

In rejecting the contention that the franchise is a privilege not a right, Justice Marshall stated for the court in 1910:

119. See *State ex rel. Owen v. Donald*, 160 Wis. 21, 70, 151 N.W. 331, 346 (1915). While it shows the legislative intent, pretty conclusively, what meaning the framers of the constitution intended to convey by the term "internal improvements" might be more restrictive. We must recognize that it is the latter which is the subject for discovery.

120. Art. I, § 1.

121. Art. I, § 22. Sections 23 and 24 of article I relating to transportation of school children and use of school buildings were created in 1967 and 1972 respectively.

122. COOLEY, *supra* note 23, at 95. Wisconsin authority supporting Cooley comes from Judge Winslow's observation in 1906 that "[T]here are inherent rights existing in the people prior to the making of any of our constitutions. . . ." and his reference to the words of art. I, § 1:

Notice the language "to secure these [inherent] rights governments are instituted;" not to manufacture new rights or to confer them on its citizens, but to conserve and secure to its citizens the exercise of pre-existing rights.

Nunnemacher v. State, 129 Wis. 190, 200, 108 N.W. 627, 629 (1906).

The difficulty seems to have been in failing to distinguish between fundamental limitations which the people, in forming a government, may place upon a right and the creation of the right itself.¹²³

A year later, Marshall observed:

[T]he constitution is a very human document in the sense that it is a collection of words recognizing, characterizing, and guaranteeing the natural rights of man. . . . but it is not so in the sense of creating such rights. The right to life, to liberty, to happiness, to equality one with another, are not of human creation. They are of Divine origin, though by human instrumentality some one or more of them might be taken away. It is to prevent that, in the main, the constitution was framed.¹²⁴

But these rights were not frozen as of 1848. That, in the language of Justice Barnes, "would be tantamount to an egotistical declaration that when the constitution was framed the millenium had arrived and progress had reached its ultimate goal."¹²⁵

The Wisconsin Constitution, unlike that of most states, avoids a detailed specification of individual rights. Justice Marshall wrote in 1913:

When it came to forming our state constitution, it was supposed that the safety of human rights was sufficiently provided for by the general declaration [article I, section 1] and the detail provisions associated therewith, emphasized by the significant admonishment as to the importance of a "frequent recurrence to fundamental principles." [article I, section 22]. So no special guaranties were added, as has been the case in most state constitutions.¹²⁶

In Chief Justice Rosenberry's language, the Wisconsin Consti-

123. *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 12, 128 N.W. 1041, 1045 (1910).

124. *Borgnis v. Falk Co.*, 147 Wis. 327, 378, 133 N.W. 209, 226 (1911) (Marshall, J., concurring).

125. *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 339, 125 N.W. 961, 968 (1910).

126. *Ekern v. McGovern*, 154 Wis. 157, 254, 142 N.W. 595, 624 (1913). In 1910, Justice Marshall described art. I, § 1, as

the substructure upon which our whole constitutional system is bottomed. It breathes the all-pervading purpose of the whole body of fundamental law. Around and upon it are clustered all other things as subsidiary in a complete structure.

State ex rel. McGrael v. Phelps, 144 Wis. 1, 14, 128 N.W. 1041, 1046 (1910).

tution is "primarily a set of principles and not of rules" ¹²⁷ The fear was that a detailed specification of rights might weaken the document. Speaking of the state constitution's prohibition against sectarian instruction, Justice Lyons wrote in 1890:

Constitutions deal with general principles and policies, and do not usually descend to a specification of particulars. Such is the character of the provision in question. In general terms it excludes sectarian instruction, and the exclusion includes all forms of such instruction. Its force would or might have been weakened had the attempt been made to specify therein all the methods by which such instruction may be imparted. ¹²⁸

The constitution is not to be construed like a legislative enactment. "A constitution which is to stand as the charter by which to test, to guard, and to afford practicable individual and collective enjoyment of, inherent rights, is not like a code of ordinary law." ¹²⁹ A statute "is necessarily subject to frequent changes to meet new conditions, or broaden or narrow old ones, which may be of a somewhat permanent or of quite a temporary nature," but a constitution is "a direct sovereign declaration of principles evolved from long experience, conservative of, or necessary to, efficient vitality of the basic idea of human government and adaptable to conditions *in praesenti* and so far into the future as human foresight can reach." ¹³⁰

127. Integration of Bar Case, 244 Wis. 8, 46, 11 N.W.2d 604, 621 (1943). The distinction is aptly made by the court in *State ex rel. Owen v. Donald*, 160 Wis. 21, 69, 151 N.W. 331, 346 (1915), in construing the art. VIII, § 10, prohibition against the state's contracting debts for "works of internal improvement":

What are "works of internal improvement," in a constitutional sense, would admit of differences of opinion as an original proposition. If it be confined to the particular kind of improvements which moved the framers of the constitution to make the broad prohibition a part of the fundamental law, it means one and a somewhat narrow thing. If it was a principle the constitution makers had in view, and not particular activities within the scope of such principle, it means quite another and covers a very broad field.

128. *State ex rel. Weiss v. District Bd. of School Dist. No. 8*, 76 Wis. 177, 199, 44 N.W. 967, 975 (1890). See also Justice Marshall's description of art. I, § 1: "That it was intended to cover a broad field not practicable to circumscribe by any specific limitation or limitations cannot well be doubted." *State v. Redmon*, 134 Wis. 89, 101, 114 N.W. 137, 138 (1907).

129. *State ex rel. Postel v. Marcus*, 160 Wis. 354, 360, 152 N.W. 419, 422 (1915).

130. *Id.* at 361, 152 N.W. at 422. The Declaration of Rights is virtually unchanged since 1848.

In construing particular provisions of the state constitution, the Wisconsin Supreme Court has frequently looked to sections 1 and 22 of article I, and to the preamble itself, to ascertain the broader purpose of the constitution as a whole. The preamble provides:

We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility and promote the general welfare, do establish this constitution.

Unlike the preamble to the Federal Constitution,¹³¹ by this preamble, "preservation of liberty is given precedence over the establishment of government."¹³² The Wisconsin court has frequently referred to the preamble as expressing the declared purposes of the constitution as a whole.¹³³

In ascertaining the meaning of the constitution, the court has looked to article I, section 1, to find the "constitutionally declared purposes of government,"¹³⁴ and has regarded it as "that comprehensive, basic guaranty making the constitution as a whole a recognition and pledge for the preservation of the rights to life, liberty, and the pursuit of happiness."¹³⁵

131. We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

132. *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 532, 90 N.W. 1098, 1099 (1902). Referring to art. I, sec. 1, and the preamble, Justice Dodge stated:

It would be inconceivable that the people of Wisconsin, in establishing a government to secure the rights of life, liberty, and the pursuit of happiness, should by general grant of legislative power have intended to confer upon that government authority to wholly subvert those primary rights . . .

Id. at 532-33, 90 N.W. at 1099.

133. *See State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 614, 37 N.W.2d 473, 480 (1949); *State ex rel. Atwood v. Johnson*, 170 Wis. 251, 258, 176 N.W. 224, 226 (1919); *Borgnis v. Falk Co.*, 147 Wis. 327, 373, 133 N.W. 209, 224 (1911) (Marshall, J., concurring); *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 532, 90 N.W. 1098, 1099 (1902); *see also* STORY, *supra* note 2, at 350-51.

134. *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 614, 37 N.W.2d 473, 480 (1949); *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 532, 90 N.W. 1098, 1099 (1902).

[Section 1] declares the purpose of the government about to be created. . . . At this late date it cannot be doubted that this declaration of the purpose to be accomplished is to be construed as a limitation upon the powers given.

135. *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 506, 107 N.W. 500, 512 (1906).

The supreme court has also recurred to the values of article I, section 22, in construing the constitution.¹³⁶ Justice Marshall stated in 1913, "There is no more important of such principles than the one that private rights should be guarded, so far as feasible, beyond even the possibility of arbitrary unjust interference" ¹³⁷ Justice Fowler said in 1935:

When things so monstrous as this are contemplated as within the language of the statutory provisions under consideration it behooves us to heed the admonitions of sec. 22, art. I, of our state constitution . . . and to consider and determine whether the thing attempted is contrary to those principles.¹³⁸

When construing particular provisions of the state constitution, the court is to "tak[e] that broad view which gives the constitution the effect intended . . . to secure the inherent rights of men."¹³⁹ To construe a provision of the constitution so as to narrow its broad purposes "would be to destroy the spirit and to cramp the letter."¹⁴⁰ To effectuate the purpose of the instrument as a whole, the literal sense of the words "may be viewed broadly or restrictively, or even violated. . . ." ¹⁴¹

In *State ex rel. Rodd v. Verage*,¹⁴² the supreme court, in order to render effective the purpose of the constitution as a whole, supplied the words "for cause" as a limitation upon the provision empowering the governor to remove elected county officers. Justice Owens stated for the court:

If the provision we are considering is to be construed as conferring arbitrary power of removal upon the governor, then it is apparent that the governor may remove county officers who are distasteful to him from personal, political, or other reasons and install officers of his own choosing to discharge the official functions of these various county officers. That idea

136. See, e.g., *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 354, 125 N.W. 961, 973 (1910) (Marshall, J., concurring); *State v. Redmon*, 134 Wis. 89, 102, 114 N.W. 137, 139 (1907); *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 506, 107 N.W. 500, 512 (1906).

137. *Ekern v. McGovern*, 154 Wis. 157, 262, 142 N.W. 595, 627 (1913).

138. *Stierle v. Rohmeyer*, 218 Wis. 149, 167, 260 N.W. 647, 655 (1935).

139. *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 353, 125 N.W. 961, 973 (1910) (Marshall, J., concurring).

140. *Story*, *supra* note 2, at 323.

141. *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 504, 111 N.W. 712, 713 (1907).

142. 177 Wis. 295, 187 N.W. 830 (1922).

is not only obnoxious to an inherent sense of plain and fundamental justice, but it is out of harmony with the genius and spirit of our institutions and would seem to neutralize a fundamental principle of popular government which was plainly intended to be intrenched in the fundamental law of the state.¹⁴³

The state court has recognized that the language employed in the provisions of the Declaration of Rights are to receive a broad construction,¹⁴⁴ and are to be construed in light of our present notions of human dignity.¹⁴⁵

Chief Justice Winslow's interpretation of the general clauses of the Declaration of Rights, in the light of contemporary conditions, is worth repeating at length:

A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystallize with more less [*sic*] fidelity the political, social, and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time. But the difficulty is that, while the constitution is fixed or very hard to change, the conditions and problems sur-

143. *Id.* at 299-300, 187 N.W. at 833.

144. Speaking of the inherent rights secured by art. I, § 1, Justice Dodge stated in 1902:

[T]hese words in the constitution are not to receive an unduly limited construction . . . for example, that "liberty" does not mean merely immunity from imprisonment, and that "property" is not confined to tangible objects which can be passed from hand to hand; that within the former word is included the opportunity to do those things which are ordinarily done by free men, and the right of each individual to regulate his own affairs, so far as consistent with rights of others; and within the latter, those rights of possession, disposal, management, and of contracting with reference thereto, which render property useful, valuable, and a source of happiness, right to pursuit of which is preserved.

State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 533-34, 90 N.W. 1098, 1100 (1902). Justice Winslow said in 1906:

It is true that the inherent rights here referred to are not defined but are included under the very general terms of "life, liberty, and the pursuit of happiness." It is relatively easy to define "life and liberty," but it is apparent that the term "pursuit of happiness" is a very comprehensive expression which covers a broad field.

Nunnemacher v. State, 129 Wis. 190, 200, 108 N.W. 627, 629 (1906).

145. *State ex rel. Rodd v. Verage*, 177 Wis. 295, 322, 187 N.W. 830, 841 (1922): [O]ur fundamental notions of the rights of the individual, of the liberty of the citizen, and of the repository of sovereign power do not conform to the spirit in which the principles of the common law were generated and developed.

rounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third; the race moves forward constantly, and no Canute can stay its progress.

Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office. But when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present-day people and conditions?

When an eighteenth century constitution forms the charter of liberty of a twentieth century government must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.

Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation.¹⁴⁶

X. CONCLUSION—RECURRENCE TO AN INDEPENDENT INTERPRETATION

The recent decisions of the Wisconsin Supreme Court indicating that the Declaration of Rights may afford greater protection to the liberties of the people of Wisconsin than does the Federal Bill of Rights, have focused largely on the holdings of early Wisconsin cases.¹⁴⁷ This is merely a start towards an appreciation of the independent vitality of the state constitution.

146. *Borgnis v. Falk Co.*, 147 Wis. 327, 348-50, 133 N.W. 209, 215-16 (1911).

147. See cases cited at notes 1 and 12 *supra*.

An examination of the reasoning of the early decisions may prove most helpful.

These early decisions recognize that the primary and express purpose of the Wisconsin Constitution is to secure the individual rights of its people. They heed the constitutional admonition that "the blessings of a free government can only be maintained . . . by frequent recurrence to fundamental principles"¹⁴⁸ and recur to the values and traditions of Wisconsin.

Although willing to consider federal precedent which accords with the values of the Wisconsin Constitution,¹⁴⁹ the early court refused to be bound by contrary decisions. "We are fully aware that the contrary proposition has been stated by the great majority of the courts of this country, including the supreme court of the United States. The unanimity with which it is stated is perhaps only equaled by the paucity of reasoning by which it is supported."¹⁵⁰

Finally, they placed their sole reliance upon the Wisconsin Constitution. Justice Smith's statement in 1855 is particularly meaningful today:

The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs—let us construe, and stand by ours.¹⁵¹

148. Art. I, § 22.

149. See *Allen v. State*, 183 Wis. 323, 329, 197 N.W. 808, 810 (1924):

Under the constitution of our state every argument advanced by the United States supreme court in favor of a broad and liberal construction of such provisions is applicable and persuasive.

Justice Brennan recently wrote:

[S]tate court judges and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guaranties, may they properly claim persuasive weight as guideposts when interpreting counterpart state guaranties.

Brennan, *supra* note 3, at 502.

150. *Nunnemacher v. State*, 129 Wis. 190, 198, 108 N.W. 627, 628 (1906).

151. *Attorney Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567, [*758] (1856).